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PP

v.

MOHD NIZAM IDRIS

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HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 41-100-2007]
6 NOVEMBER 2007

C ***CRIMINAL LAW:*** *Dangerous Drugs - Trafficking in cannabis - Storage of drug exhibits - Proof - Whether sufficient evidence tendered of storage of subject drugs - Dangerous Drugs Act 1952, s. 6*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 6 -*
D *Possession of cannabis - Whether prima facie case made out - Whether accused had custody and control of cannabis - Police officer saw accused throwing packet containing cannabis - Doubt whether accused threw away packet containing cannabis before or during examination of vehicle and his person by police - Immaterial when accused threw away packet*

E ***CRIMINAL PROCEDURE:*** *Trial - Failure to call witness - Offence of possession of cannabis found in vehicle - Failure by prosecution to produce owner of vehicle - Existence of vehicle and identity of owner established - Offence occurred five years before - Difficulty in locating owner and vehicle - Prosecution given a period of less than two weeks to*
F *locate owner - Inequitable to penalize prosecution for non-procurement of witness*

CRIMINAL PROCEDURE: *Trial - Miscarriage of justice -*
Prosecution precluded from producing material evidence - Magistrate's
G *decision to end prosecution case by refusing further adjournments - Whether caused miscarriage of justice - Whether prosecution should have been accorded further opportunity to procure witness and evidence*

EVIDENCE: *Exhibits - Custody of exhibits - Dangerous drugs -*
H *Trafficking in cannabis - Whether movement of exhibits properly recorded by police - Whether sufficient evidence tendered of storage of subject drugs - Whether documentary proof or records must be produced to proof storage or movement of exhibits - Dangerous Drugs Act 1952, s. 6*

I The accused was charged with possession of cannabis under s. 6 of the Dangerous Drugs Act 1952 ('the Act'). Several police officers had stopped a motorcar driven by the accused who was the sole occupant. The vehicle belonged to one Khodijah binti

Halim. The arresting officer ('SP2') gave evidence that after the car had been stopped, he saw the accused throw a white package onto the road. SP2 said that he then picked up the white paper package and asked the accused to get out of the vehicle. Two plastic packets were also found underneath the car mat of the driver's seat. All contained cannabis. However, in his police report, SP2 had stated that while he was conducting a search on the accused and the vehicle, he saw the accused throw the white paper package. During cross-examination, SP2 said that the version in the police report was inaccurate and that his version in court while giving his testimony was true. On the final date fixed for hearing, the prosecution sought an adjournment to produce their final witness, Khodijah binti Halim. The court had fixed this date as the final date and refused to adjourn the matter further. At the close of the case for the prosecution, the learned Magistrate discharged and acquitted the accused holding, *inter alia*, that (a) there was no record produced by SP3, as to where the seized items were stored/kept; (b) there were no records showing the movement of the exhibits; (c) the vehicle was not produced in court; (d) the owner of the vehicle, Khodijah was not called to give evidence; and (e) that there was a material contradiction in the evidence of SP2. The prosecution appealed.

Held (allowing the appeal):

(1) SP3 gave oral evidence of the fact that she stored the exhibits in a steel cabinet in her office, to which only she had keys. This was sufficient evidence of storage of the subject drugs. There was no challenge of this evidence. There is no requirement that documentary proof or records be produced to provide further proof of such storage or movement of the exhibits. Accordingly the finding by the magistrate that the failure of the prosecution to produce documentary records of safekeeping and movement of the exhibits was unfounded and without merit. (paras 17 & 18)

(2) The essential ingredient in the proof of "possession" is whether the accused had "custody" and "control" of the packet containing the drugs. The essential fact evidencing custody and control was therefore the fact that SP2 saw the accused throwing the white packet containing the drugs. Whether SP2 saw this before or during the examination of the vehicle and his person, did not detract from the fact that he did see the accused throw away the white packet containing

A the drugs. Accordingly the "contradiction" was not so material as to destroy his evidence or his credibility completely. (para 24)

(3) SP3 had interviewed Khodijah bte. Halim who had given a B statement. It was clear that the vehicle existed and its owner had been identified. The time gap between the penultimate date of hearing, *ie*, 16 January 2007 and 31 January 2007 was not very long. As the incident had occurred some five years previously, it was not unusual or extraordinary that there was C difficulty in locating the owner and the vehicle. A period of less than two weeks to locate a witness previously interviewed by the police in respect of an incident some five years ago, was a short time. To penalize the prosecution for the non-procurement of this witness was inequitable. (para 29)

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(4) The prosecution was precluded from producing evidence which was material to its case. The learned magistrate's decision to bring the prosecution case to an end by refusing any further adjournments was misconceived and had caused a miscarriage of justice. The prosecution should have been accorded further E opportunity to procure the owner of the vehicle and the vehicle for purposes of identification. (para 29)

Case(s) referred to:
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
F *Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 FC* ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399(1)
Dangerous Drugs Act 1952, s. 6

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For the prosecution - Azar Irwan Mohd Ariffin, DPP

Reported by Amutha Suppayah

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JUDGMENT

Nallini Pathmanathan JC:

[1] This is an appeal from the decision of a magistrate acquitting and discharging the respondent, Mohd. Nizam bin Idris in respect I of two charges brought against him for possession of cannabis under s. 6 of the Dangerous Drugs Act 1952 ('the Act'). The first charge alleges that the accused was in possession of 12.34 grams

of cannabis contained in a transparent plastic packet. The second charge relates to possession of 13.03 grams of cannabis contained in 2 transparent plastic packets. For ease of reference, the respondent is referred to as 'the accused'.

Salient Facts

[2] The facts of the case show that on 11 April 2002 at about 5pm a raiding party of six officers stopped a white motorcar, a Proton Satria bearing registration number WHC 2376, in the car park area near Jalan Persiaran Utama, Pandan Indah, Ampang, Selangor. The driver of the vehicle was a Malay man and he was also the sole occupant of the car. The driver was the accused.

[3] Inspector Chai Chee Boon, ('SP2') who was the arresting officer gave evidence that after the car had been stopped, he introduced himself as a police officer and produced his identification. He then went towards the vehicle with a view to conducting a body search on the driver of the vehicle, ie, the accused, as well as a search of the vehicle. SP2 said in evidence that he then saw the accused throw a white package onto the road from the right side of the vehicle. The accused was in the vehicle at the time, and SP2 was about 2 metres away from him. The vehicle was stationary.

[4] SP2 instructed his team members to arrest the accused. He picked up the white paper package himself. He then went further towards the vehicle and asked the accused to get out of the vehicle. This was to facilitate a body search. A search on the person of the accused and the vehicle was carried out. In the meantime the white package which was shaped like an envelope was examined and found to contain 1 transparent plastic packet filled with dried plant material suspected to be cannabis with an estimated weight of 13.15 grams.

[5] An examination of the vehicle produced another two transparent plastic packets that were also filled with plant material suspected to be cannabis of estimated weight 14.15 grams. These two plastic packets were found underneath the car mat of the front right driver's seat.

[6] The items found were duly seized and the accused and exhibits taken to the police station where a police report was lodged. SP2 weighed the exhibits to obtain the gross weight of the plant material and its covering. He then placed identification marks

on the exhibits, ie his signature and the date, filled in the requisite "Borang Serah Menyerah" and surrendered the items to the investigating officer, one Chief Inspector Romaliza ('SP3').

[7] In his police report, exh. P2, SP2 documented the events of that evening. However in this report it is stated that while he was conducting a search on the person of the accused and the vehicle, he saw the accused throw a white paper package which he then examined and found to contain the plastic packet with the plant material suspected to be cannabis.

[8] In the course of being cross-examined, the discrepancy between his oral evidence and the statement in the police report was put to him. He immediately responded by stating that the version in the police report was inaccurate, and that his version in court while giving his testimony was true.

[9] SP3, the investigating officer gave evidence that she kept the exhibits (save for the car and keys) in a steel cabinet in her room to which only she had access. She sent the exhibits for analysis to the Chemistry Department through one Sergeant Mohd. Nasir bin Che Soh, SP4, some 32 days after the incident on 13 May 2002. The analysis was completed by 1 July 2002 when SP4 once again collected the analysed exhibits and the chemist's report. The report disclosed the fact that the plant material contained in the three plastic packets were indeed cannabis and that the weight of the cannabis in the packet that had been thrown away by the accused was 12.34 grams while that in the two plastic packets found underneath the car mat was 13.03 grams.

[10] SP3 also gave evidence that she had made investigations about the vehicle which she found belonged to one Khodijah binti Halim. Her further investigations (which could not be confirmed without calling the owner of the vehicle) were that the accused had utilized the vehicle for the entire day, ie, 11 April 2002 only. The vehicle had been returned to Khodijah binti Halim.

[11] On the final date fixed for the hearing of the case, the prosecution sought an adjournment to produce their final witness, Khodijah binti Halim, the registered owner of the vehicle who also had possession of the vehicle and was supposed to have produced the vehicle in court. The court had fixed this date as the final date and refused to adjourn the matter further, as according to the records, the prosecution had been given sufficient time to ensure the witness's presence in court that day. The prosecution

after stating the importance of calling the owner, acquiesced and closed its case. The vehicle and its registered owner were never therefore called.

Decision Of The Magistrate

[12] At the close of the case for the prosecution, the learned magistrate discharged and acquitted the accused. She gave several reasons for her finding that a *prima facie* case was not made out:

(a) There was no record produced by the investigating officer, SP3, as to where the seized items, ie the plastic packets containing the drugs were stored/kept;

(b) There was a delay of 32 days between the time when the items were seized and sent to the Chemistry Department. No evidence was adduced to explain this delay and this threw doubt on the case for the prosecution. SP3 did not produce any documents to prove where the exhibits were stored;

(c) There were no documents or records showing the movement of the exhibits to and from the Chemistry Department;

(d) There were no records evidencing how the exhibits were stored after analysis by the Chemistry Department;

(e) The Proton Satria registration number WHC 2376 was not produced in court, although this was material as the drugs in respect of the second charge were found under a car mat in the vehicle.

(f) The owner of the vehicle, Khodijah was not called to give evidence; she was a material witness to establish who had custody of the vehicle;

(g) There was a material contradiction in the evidence of SP2 as in his testimony in court he said that the white packet was thrown out when SP2 was approaching the accused in the vehicle, while in the police report SP2 states that the packet was thrown out while the examination of the person of the accused and vehicle was undertaken.

(h) The chemist was not called to give evidence.

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Appeal

[13] In the Petition of Appeal, the appellant, the prosecution set out several grounds of appeal stating that the magistrate had erred in:

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(a) not finding that a *prima facie* case had been made out;

(b) ordering the prosecution to close its case without allowing an adjournment to enable the owner of the vehicle to give evidence and produce the vehicle;

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(c) failing to consider s. 399(1) of the Criminal Procedure Code which alleviated the necessity for the prosecution to call the chemist as a witness;

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(d) requiring the other police officers of the arresting team to give evidence.

[14] Counsel for the accused rebutted each and every one of these grounds and defended the grounds of judgment of the learned magistrate.

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[15] Issues: The issues in the Petition of Appeal will be considered in turn in conjunction with the grounds given by the Magistrate in deciding that a *prima facie* case was not made out.

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Issue (i): Record Of The Storing And Movement Of The Subject Exhibits – Was There A Gap In The Chain Of Evidence?

[16] The magistrate stated that that there were no records of the storage of the exhibits after they were seized and handed over to SP3 on the night of 11 April 2002. She also stated that there were no documents evidencing the movement of the exhibits from the offices of SP3 to the Chemistry Department and back again and how these exhibits were stored after analysis. In short she held that there was a gap in the chain of evidence in relation to the storage, analysis and production of the exhs. P7 and P8.

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[17] In so concluding the magistrate appears to have wholly ignored the evidence of SP3 who gave oral evidence of the fact that she stored the exhs. P7 and P8 in a steel cabinet in her office, to which only she had the keys. This statement on oath by SP3 is sufficient evidence of storage of the subject drugs. This is particularly so in the absence of any challenge of this point in

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cross-examination and in the absence of any other evidence suggesting that the exhibits were not in fact stored as affirmed on oath by SP3. There is no requirement that documentary proof or records be produced to provide further proof of such storage. Similarly there is no such requirement with the movement of the exhs. P7 and P8 from SP3's office to the Chemistry Department. SP4 was called to, and did give evidence that he personally delivered and collected the subject exhibits after analysis. This again is sufficient proof that the exhibits that were seized were in fact the same exhibits that were analysed by the Chemistry Department and then handed back to SP4 for safekeeping for the trial. All the material witnesses to show the movement of the drugs were called. In *Pendakwa Raya v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 the Federal Court stated as follows in relation to the issue of safekeeping of the exhibits:

> ... Having regard to the evidence of PW1 and PW13 and in the absence of any cross-examination by the defence about the safe keeping of the cannabis and any suggestion of other chemist or chemists meddling with it, the concern of the learned trial judge that the cannabis exhibited in court might not be the same as the one seized from the house in which the respondents lived was, in our view, misplaced. On the evidence adduced, there cannot be any doubt that the cannabis seized and handed to PW1 and PW13 was the cannabis produced in court in this trial. When no such doubt existed, it was not essential for PW1 to show how she kept the cannabis before returning it to PW13, particularly when the defence did not at all cross-examine on or raise the issue. More pertinent to the instant ground of appeal, we are of the clear view that no question of break in the chain of evidence' arises ... .

[18] Accordingly the finding by the magistrate that the failure of the prosecution to produce documentary records of safekeeping and movement of the exhibits was fatal to the prosecution's case, is unfounded and without merit.

Issue (ii): Did The Delay Of 32 Days In Sending The Exhibits To The Chemistry Department Prove Fatal To The Prosecution Case?

[19] The answer to this question must be in the negative. Although all delays in investigation are disapproved of, the delay of 32 days prior to sending the exhibits to the chemist did not cause the subject exhibits to deteriorate or disappear or to be adversely affected in any way.

[20] Neither did the fact of the delay in itself throw "doubt" on the prosecution case. The magistrate has failed to explain why she so concluded. In these circumstances, this finding also has no basis or merit.

Issue (iii): There Was A Material Contradiction In The Evidence Of SP2

[21] As set out above, SP2's version of events in his police report and his oral testimony varied to this extent:

> In his oral testimony SP2 states that the accused threw the white packet out of the vehicle when he, SP2, was approaching the car. This is what he said in court:
>
> > ... Setelah perkenalkan diri Polis dan tunjukkan kad kuasa polis saya telah menghampiri kenderaan tersebut bertujuan untuk jalankan pemeriksaan badan dan kereta tersebut kemudian saya telah nampak lelaki Melayu tersebut telah membuangkan 1 bungkusan kertas putih ke atas jalan raya di sebelah kanan kenderaan tersebut ...

[22] In his police report, SP2 says that the white plastic packet was thrown out while he was undertaking a search of the person of the accused as well as the vehicle. This is the statement in his police report:

> Saya perkenalkan diri sebagai Pegawai Polis dengan menunjukkan Kad Kuasa dan membuat pemeriksaan tubuh badan dan di dalam kereta tersebut. Semasa pemeriksaan di jalankan saya telah nampak suspek membuang satu bungkusan kertas berwarna putih dan saya telah mengambil bungkusan tersebut ....

[23] SP2 went on to confirm that his evidence in court was the accurate version of events, not the police report. No other witnesses were called to give evidence. In the absence of any such corroborative evidence, could SP2's version in court be accepted as the true account of events that evening? The prosecution took the position that it could. The learned deputy public prosecutor argued that what was material was the fact that the white packet was thrown out of the vehicle; the fact of precisely when it was thrown out, ie, immediately prior to, or after the examination of the vehicle had commenced did not detract from this fact. Counsel for the accused on the other hand countered that this was a material contradiction which threw doubt on SP2's evidence. The

issue for determination is whether in fact, SP2's testimony relating to the act of the accused in throwing out the white paper packet should be disregarded in view of the differences in his oral evidence and his police report.

[24] The essential ingredient in the proof of "possession" is whether the accused had "custody" and "control" of the white packet containing the plastic packet with the drugs. The issue of whether or not the accused had custody and control of the white packet is, to a considerable extent, evidenced by the fact that the accused threw the white packet out of the vehicle, because this shows he had the power of disposal and knew the contents of the white package. The essential fact evidencing custody and control is therefore the fact that SP2 saw the accused throwing the white packet containing the drugs. Whether SP2 saw this before or during the examination of the vehicle and his person, does not detract from the fact that he did see the accused throw away the white packet containing the subject drugs. This fact is not in issue, as is evident from both his testimony and his police report. Accordingly the "contradiction" is not so material as to destroy his evidence or his credibility completely. In *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043 the Federal Court referred to and reiterated the statements in *Herchun Singh & Ors v. Public Prosecutor* [1969] 1 LNS 52. Although that case dealt with omissions in a first information report, the principle enunciated there is relevant here:

> ... In short, it is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances ...

[25] I am mindful also that this court as an appellate court should be slow to "reverse" a finding of fact by a trial court. In the instant case however, SP2 himself has admitted and explained the difference in his two statements. This court is not "reversing" or altering the finding that there is a difference between SP2's oral testimony and his initial police report. It is merely concluding after having considered the record of testimony as a whole, that the difference is not so material as to destroy SP2's evidence

completely on the more crucial matter of his having seen the white packet being thrown away by the accused. As such the learned magistrate's conclusion that SP2's evidence was entirely unreliable is erroneous. SP2's evidence should therefore have been taken into consideration in ascertaining whether there was a *prima facie* case against the accused in respect of the 1st charge.

Issue (iv): The Proton Satria registration number WHC 2376 was not produced in court, although this was material as the drugs in respect of the second charge were found under a carmat in the vehicle; and The owner of the vehicle, Khodijah was not called to give evidence; she was a material witness to establish who had custody of the vehicle

[26] The notes of proceedings disclose that on 16 January 2007, prosecution informed the learned magistrate that they only had to procure the presence of the owner of the Proton Satria, Khodijah bt. Halim to produce the vehicle, which was in her possession and to hear her evidence on the use of the car by the accused. The Magistrate specifically noted that prosecution was required to produce all necessary exhibits for identification at the following hearing on 31 January 2001. She also noted that hearing would be the final date of trial for this matter.

[27] On 31 January 2007, the prosecution were unable to effect service of the subpoena on Khodijah bt. Halim. As such the car could not also be produced as an exhibit. The prosecution sought an adjournment of the matter on the grounds that these exhibits were essential for proof of the case. The trial court was informed that the prosecution was unable to verify if Khodijah still lived at the same address because the personnel at the station tasked to serve the subpoena had not reverted to them. The learned magistrate decided not to grant a further adjournment to enable this witness to be subpoenaed on the grounds that the prosecution had been accorded sufficient time to procure the witness and as this was the final date of hearing. She further concluded that no sufficient reason was forwarded as to why the witness could not be brought. The case for the prosecution was therefore closed.

[28] In her grounds of judgment, the learned magistrate concluded that no *prima facie* case had been made out because the vehicle, the Proton Satria had not been produced. The owner of the vehicle should also have been called to give evidence, she concluded, to enable the court to determine the issue of the use of the car on, *inter alia*, 11 April 2002.

[29] What falls to be considered here is whether the learned magistrate ought to have accorded further time to the prosecution for the procurement of the presence of the owner of the vehicle and the vehicle. In other words, should she have exercised her discretion to allow a further adjournment? It is clear that this was an old case which had been outstanding for some time. The magistrate had made it clear to the prosecution that all necessary exhibits had to be produced by 31 January 2007, the final date of hearing. This the prosecution could not do. The magistrate's objective in seeking to complete the matter expeditiously cannot be faulted. As against this, however, the vehicle is an essential piece of evidence for the purposes of proof of both the 1st and 2nd charges. SP3, the investigating officer had given evidence that she had made the requisite investigations into the ownership of the vehicle. It was also apparent that she had interviewed the owner, Khodijah bte. Halim. She had even given a statement to the police. Therefore it was clear that the vehicle existed and its owner had been identified. The time gap between the penultimate date of hearing, ie, 16 January 2007 and 31 January 2007 was also not very long. As the incident had occurred some five years previously, it was not unusual or extraordinary that there was difficulty in locating the owner and the vehicle. A time period of less than two weeks to locate a witness previously interviewed by the police in respect of an incident some five years ago, is a short time. To therefore penalize the prosecution for the non-procurement of this witness who in turn was the owner of the vehicle, appears to be inequitable. Further, it should or ought to have been clear to the learned magistrate that without this evidence the charges preferred against the accused would have no basis. Yet it is precisely on this basis that she has founded her decision to acquit and discharge the accused of both charges. Such a conclusion is, in the circumstances not justified as the prosecution was, in effect, precluded from producing evidence which was material to its case. The learned magistrate's decision to bring the prosecution case to an end by refusing any further adjournments is misconceived and has caused a miscarriage of

justice. The prosecution should have been accorded further opportunity to procure the owner of the vehicle and the vehicle for purposes of identification.

[30] In view of my conclusion on this issue, there is no necessity for me to consider the further issue of the chemist's report put forward as a ground of appeal.

Conclusion

[31] For the reasons set out above, I have come to the conclusion after hearing submissions from both parties that this was a case where the learned magistrate had misdirected herself on several matters. The appeal is therefore allowed and the order of the learned magistrate acquitting and discharging the accused of both charges, set aside. The case is remitted for retrial to the magistrate's court.